Supreme Court, U.S.
FILED

02 812 NOV 22 2002

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

MARK FISHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH L. HAMMONS
Counsel of Record
HAMMONS, LONGORIA & WHITTAKER, P.A.
17 West Cervantes
Pensacola, FL 32501
(850) 434-1068

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

61 pp

QUESTION PRESENTED FOR REVIEW

1. WHETHER THE "ANALOGUE ACT", 21 U.S.C. § 813, BECAUSE OF THE DEFINITION OF A "CONTROLLED SUBSTANCE ANALOGUE", 21 U.S.C. § 802(32)(A), IS UNCONSTITUTIONALLY VAGUE AND OVERLY BROAD DEPRIVING PETITIONER AND OTHER CITIZENS OF THE OPPORTUNITY TO ASCERTAIN WHAT CONDUCT IS PROHIBITED AND ENCOURAGING ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE ANALOGUE ACT?

PARTIES TO THE PROCEEDINGS

1. Mark Fisher, Petitioner
2. *Devon Sutton, Co-defendant
3. Arthur Robertson, Co-defendant
4. Chad Orso, Co-defendant

*Devon Sutton filed Petition for Writ of Certiorari on or about November 13, 2002.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	3
ARGUMENT	7
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASE CITATIONS:

Kolender v. Lawson, 461 U.S. 352 (1983) 7

McKinney v. United States, 79 F.3d 105 (8th Cir. 1996) 10

Smith v. Goguen, 415 U.S. 566 (1974) 7

United States v. Carlson, et al., 87 F.3d 440 (11th Cir. 1996) 9, 10

United States of America v. Mark Fisher, 289 F.3d 1329 (11th Cir. 2002) 1

United States v. Forbes, 806 F.Supp. 232 (D. Colo. 1992) 8, 10, 11

United States v. Granberry, 916 F.2d 1008 (5th Cir. 1990) 9, 10

United States v. Greig, 144 F.Supp.2d 386 (D. V.I. 2001) 11

United States v. Klecker, 2002 WL 31413873 (E.D.Va. Oct. 18, 2002) 11

United States v. Roberts, 2001 WL 1646732 (S.D. N.Y. Dec. 17, 2001) 11

United States v. Vickery, 199 F.Supp.2d 1363 (N.D.Ga. May 16, 2002) 11

STATUTORY AUTHORITY:

21 U.S.C. § 802(32)(A) 2, 5, 6, 7, 9

21 U.S.C. § 802(32)(B) 2

21 U.S.C. § 802(32)(C) 3, 6, 12, 13

21 U.S.C. § 802(34) 4

TABLE OF AUTHORITIES – Continued

Page

21 U.S.C. § 813.....2, 5, 6, 7, 8

28 U.S.C. § 1254..... 1

MISCELLANEOUS:

U. S. Const., Amend V 1

Public Law 106-172 (the Hillory J. Farias and Samantha Reid Date-Rape Prohibition Act of 2000).....4, 5

OPINIONS AND ORDERS BELOW

The judgment of the United States District Court for the Southern District of Alabama is unreported. The opinion of the Eleventh Circuit is reported. See *United States of America v. Mark Fisher, Devon Sutton, and Arthur Robertson,* 289 F.3d 1329 (11th Cir. 2002). A copy of both decisions is included in the appendix to this petition.

STATEMENT OF JURISDICTION

The judgment below was entered May 2, 2002 with Petitions for Rehearing by all defendants denied August 28, 2002. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 21, Section 813:

> A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.

United States Code, Title 21, Section 802(32)(A):

> Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance–
>
> (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
>
> (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

United States Code, Title 21, Section 802(32)(B):

> The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to paragraph (34) or (35) does not preclude a finding pursuant to subparagraph (A) of this paragraph that the chemical is a controlled substance analogue.

United States Code, Title 21, Section 802(32)(C):

> Such term does not include –
>
> (i) a controlled substance;
>
> (ii) any substance for which there is an approved new drug application;
>
> (iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) to the extent conduct with respect to such substance is pursuant to such exemption; or
>
> (iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

STATEMENT OF THE CASE

Petitioner, Mark Fisher, owns and operates Gold's Gym in Mobile, Alabama. Along with facilities for exercising, and weight training, the gym sells a number of liquid products popular with patrons of physical fitness centers. One of the products sold prior to April 19, 2000, was a chemical mixture known as "Verve" which had gamma-butyrolactone (GBL) as an ingredient. GBL is a common industrial chemical and, if ingested into the human body, is metabolized into gamma-hydroxybutyrate acid (GHB). Some chemical mixtures containing GBL are believed to have the effect of a "growth hormone" that builds muscle, reduces fat, and promotes a deep sleep. GHB is believed by some to stimulate muscle growth. (65 Fed. Reg. 13235). A pharmaceutical formulation of GHB is being developed as

treatment for catalepsy, a condition associated with narcolepsy. Public Law 106-172, Sec. 2. GHB has been subject to abuse by mixing with alcohol which potentiates its impact. Abuse of GHB prompted Congress to pass the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000. See Public Law 106-172 (hereafter the Act). The Act directed the Attorney General to schedule gamma-hydroxybutyrate acid (GHB) as a "Schedule I" controlled substance bypassing rulemaking requirements and statutory requisites for a substance to be designated a "controlled substance" under Schedule I of the Controlled Substances Act. The Act also made reference to gamma-butyrolactone (GBL) as a chemical precursor to GHB and directed that GBL be added as a "List I chemical under § 802(34) of the Controlled Substances Act".[1] PL 106-172, Sec. 3. A second reference was made to GBL in Sec. 5 of the Act wherein it is provided the designation of GBL or any other chemical as a listed chemical does not preclude a finding that the chemical is a controlled substance analogue. PL 106-172, Sec. 5. As directed by the Act, the Attorney General placed GHB on Schedule I of the Controlled Substances Act effective March 13, 2000 with the "final rule" published in the Federal Register. 65 Fed. Reg. 13235. The same Federal Register notice made the following reference to GBL:

[1] A "List I chemical" is not a controlled substance. A "List I chemical" is a chemical designated for regulation by the Attorney General as a chemical that is used in manufacturing a controlled substance. See 21 U.S.C. § 802(34).

> Public Law 106-172 also placed certain controls on GBL. These will be the subject of a separate Federal Register notice. 65 Fed. Reg. at 13236.

One month after GHB became a Schedule I controlled substance, on April 19, 2000, local and federal law enforcement agents "raided" Gold's Gym in Mobile, Alabama, armed with a search warrant which authorized the seizure of "controlled substances, controlled substance analogues, and List I chemicals", as well as other items. Several bottles of "Verve", a chemical mixture containing GBL, were seized from Gold's Gym. Thereafter, an additional 232 quarts were seized from a separate storage facility. It is undisputed that, prior to the seizure on April 19, 2000, Gold's Gym employees sold "Verve" to customers at that facility.

Petitioner, Mark Fisher, was subsequently the subject of an indictment charging possession with intent to distribute GBL, alleged to be an analogue of GHB, a Schedule I controlled substance, and with conspiracy to possess and distribute the same. Mark Fisher thereafter filed a Motion to Dismiss the indictment in which co-defendants Robertson, Orso, and Sutton joined. The Motion to Dismiss argued Public Law 106-172, alleged in the indictment to apply only through the "Analogue Act", 21 U.S.C. § 813, was vague and arbitrary denying Fisher due process of law. (Appendix C). Fisher requested an evidentiary hearing to address the issue of whether GBL can satisfy the definition of a "controlled substance analogue" of GHB within the meaning of 21 U.S.C. § 802(32)(A) and 21 U.S.C. § 813. The district court denied Fisher's Motion to Dismiss and Motion for Evidentiary Hearing. (Appendix D). Notwithstanding the denial of the Motion for Evidentiary Hearing, the district court did consider expert

witness affidavits filed by the government and Fisher, as well as representations made by the government in response to Fisher's Motion to Dismiss. Pursuant to plea agreement, Fisher and co-defendants entered conditional pleas to the reduced charge of misprision of a felony reserving the right to appeal the district court's denial of the defendants' joint Motion to Dismiss the indictment. Fisher and co-defendants raised two issues before the Eleventh Circuit Court of Appeals: (1) Whether the Analogue Act, 21 U.S.C. § 813, as applied to GBL, was unconstitutionally vague in that it provided inadequate notice of illegal behavior and allowed arbitrary and discriminatory law enforcement, and (2) whether GBL is a controlled substance analogue of GHB. The Eleventh Circuit recognized that appellate courts have reached conflicting conclusions regarding the statutory definition of an analogue and, to avoid the conflict, fashioned an application of the statutory definition not previously applied or recognized in any court.[2] Finally, the opinion concludes GBL to be an analogue of GHB and that people of ordinary intelligence applying the definition of a controlled substance analogue at 21 U.S.C. § 802(32)(A) would be able to reach that conclusion. The opinion concluded:

> We affirm the district court's holding and find that the Analogue Act, 21 U.S.C. § 813, as

[2] The Eleventh Circuit fashioned an application of the statutory definition of a controlled substance analogue in a manner neither briefed or requested by the parties. The Eleventh Circuit Opinion applied the definitional components of a controlled substance analogue with the substance at issue in the instant case, GBL, after the human body had metabolized GBL into GHB. This application violates the provisions of 21 U.S.C. § 802(32)(C).

applied to GBL, is not unconstitutionally vague. Appellants had constitutional notice that GBL was a controlled substance analogue of GHB. (App. A, p. 19).

ARGUMENT

Ambiguities within the Analogue Act, 21 U.S.C. § 813, and its definitional component, 21 U.S.C. § 802(32)(A), have resulted in conflicting judicial interpretation of what may or may not constitute a "controlled substance analogue". These same ambiguities and the resulting conflicting judicial opinions deprive Petitioner and other citizens of the opportunity to ascertain what chemical substances fall within the definition of a "controlled substance analogue", the possession or sale of which may result in severe criminal penalties.

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement". *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender*, 461 U.S. at 357 quoting *Smith v. Goguen,* 415 U.S. 566, 574 (1974).

The Analogue Act is directed at underground chemists who tinker with the molecular structure of controlled substances to create new drugs that are not scheduled. The Act's stated purpose was "to prohibit persons who specifically set out to manufacture or to distribute drugs which are substantially similar to the most dangerous controlled substances from engaging in this activity". *United States v. Forbes*, 806 F.Supp. 232, 235 (D. Colo. 1992), citing legislative history. S.Rep. No. 196, 99th Cong., 1st Sess. 5 (1985). The Analogue Act provides that "a controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any federal law as a controlled substance in Schedule I". 21 U.S.C. § 813. The definitional component of the statute provides as follows:

> Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance –
>
> (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
>
> (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the

> central nervous system of a controlled substance in schedule I or II.
>
> 21 U.S.C. § 802(32)(A).

Appellate courts and district courts have rendered conflicting opinions as to whether the definitional components under clauses (i) and (ii) or (iii) are to be read conjunctively or disjunctively. A conjunctive reading would mean that a controlled substance analogue must (i) have a chemical structure that is substantially similar to the chemical structure of a Schedule I controlled substance and (ii) must either have a substantially similar stimulant, depressant, or hallucinogenic effect on the central nervous system or (iii) is intended or represented to produce effects similar to those produced by Schedule I controlled substances. A disjunctive reading of the clauses would omit the requirement of a substantially similar chemical structure and permit either clause (i), (ii) or (iii), standing alone, to satisfy the definition of a "controlled substance analogue". If the disjunctive application prevails, the statute is rendered unconstitutionally vague and overly broad depriving ordinary people of the opportunity to understand what conduct is prohibited and rendering the statute subject to arbitrary and discriminatory law enforcement.

The Fifth Circuit Court of Appeals in *United States v. Granberry*, 916 F.2d 1008 (5th Cir. 1990) concluded the Analogue Act was not unconstitutionally vague, however, the decision turned on whether the term "controlled substance analogue" under clause (i) was sufficiently defined and readily comprehensible to the ordinary reader. *Id.* at 1010. The Eleventh Circuit has cited *Granberry* with approval. *United States v. Carlson, et al.*, 87 F.3d 440, 443

(11th Cir. 1996). The Eleventh Circuit opinion in the instant appeal has concluded *Granberry* has "paraphrased the definition in the disjunctive". (Appendix A, p. 17). While the Eleventh Circuit cited *Granberry* with approval in *Carlson*, that defendant's argument that the definition of a controlled substance analogue was unconstitutionally vague rested upon whether the phrase "substantially similar" under the first clause adequately provided notice and fair warning of conduct that may be illegal. *Carlson*, 87 F.3d at 443. The issue of a conjunctive or disjunctive construction of the statutory components was not addressed in *Carlson*. In the instant case, however, the Eleventh Circuit stated "a plain reading of the statute would indicate that the definition should be read in the alternative". (Appendix A, p. 16). The opinion in the instant case recognized that other appellate courts have concluded differently citing *McKinney v. United States*, 79 F.3d 105, 107-108 (8th Cir. 1996). In *McKinney*, the Eighth Circuit affirmed the district court finding that the Analogue Act was not unconstitutionally vague but in doing so construed the definitional components conjunctively:

> Under that statute, a drug becomes a controlled substance if it has a chemical structure substantially similar to that of a controlled substance, and either has a substantially similar effect on the user's central nervous system, or a relevant someone represents that it has or intends to have such an effect. See 21 U.S.C. § 802(32)(A). 79 F.3d at 107-108.

The inconclusive and inconsistent construction of the statutory definition of a "controlled substance analogue" in the appellate courts has resulted in confusion when district courts grapple with the definition of a "controlled substance analogue". Petitioner relied below on *United*

States v. Forbes, 806 F.Supp. 232, 234-236 (D. Colo. 1992), which applied the definitional components in the conjunctive finding this construction necessary to avoid unintended or absurd results. The court in *Forbes* noted that if it adopted the disjunctive construction, under clause (ii), alcohol or caffeine would be considered controlled substance analogues because, in concentrated form, they can have depressant or stimulant effects substantially similar to a controlled substance. *Id.* at 234. In *United States v. Greig*, 144 F.Supp.2d 386 (D. V.I. 2001), the court construed the definitional components in the disjunctive. By using the disjunctive construction, the district court reached the conclusion that a mixture of wax and flour was a controlled substance analogue of a Schedule I controlled substance because it satisfied the third clause, (iii), which involved evidence the defendants "represented" the substance would have an effect identical to that of a Schedule I controlled substance. *Id.* at 394. In *United States v. Roberts*, 2001 WL 1646732 (S.D. N.Y. December 17, 2001), the court construed the definitional components conjunctively concluding that for a substance to meet the definition of a "controlled substance analogue", clause (i) requiring a substantially similar chemical structure must in every case be satisfied along with either clause (ii) or (iii). Having adopted a conjunctive reading of the analogue statute, the court scheduled an evidentiary hearing to determine whether the substance at issue would satisfy clause (i) and either clause (ii) or (iii). In *United States v. Klecker*, 2002 WL 31413873 (E.D.Va. October 18, 2002) the District Court adopted the conjunctive interpretation finding the government had satisfied both clauses (i) and (ii). The conjunctive construction was also approved by the court in *United States v. Vickery*, 199 F.Supp.2d 1363 (N.D.Ga. May 16, 2002) in granting defendants motion to

define the elements of the offense. At issue was whether GBL and 1,4 butanedoia were "controlled substance analogues" to GHB.

In the instant case the Eleventh Circuit after concluding a "plain reading" of the statute indicates the clauses must be read "in the alternative", sought to avoid a decision on the proper construction of the definitional components by concluding that GBL satisfies the definition under either a disjunctive or conjunctive application. (Appendix, Opinion, p. 17). To reach this conclusion, the court took a position neither advocated nor briefed by the parties. Relying on the scientific fact that a chemical mixture containing GBL, upon consumption, is metabolized by the body into GHB, the court concluded the chemical structure of GBL, *after* being metabolized into GHB, would be substantially similar to GHB satisfying subparagraph (i). The chemical structures of GBL and GHB are depicted of record through Fisher's Petition for Panel Rehearing. (App. F p. 38). No reasonable layperson would conclude these chemical structures are substantially similar. The Eleventh Circuit opinion circumvents the obvious chemical structure dissimilarity by choosing not to make the comparison of chemical structures until after the human body has metabolized a chemical mixture containing GBL into GHB thereby allowing, at that point, a conclusion the chemical structures must then be substantially similar. That logic is flawed because the court compares the chemical structures only after GBL has been converted into GHB. After conversion, structural similarity is irrelevant because the substance has become GHB and not a substance to compare to GHB for structural similarity. This part of the opinion by the Eleventh Circuit directly conflicts with the provisions of 21 U.S.C. § 802(32)(C)(i) which excludes from the definition of a

"controlled substance analogue" any actual controlled substance.[3]

It should be readily apparent that the Analogue Act has resulted in conflicting and confusing opinions when courts have tried to apply the definitional components of a Schedule I controlled substance, the possession or sale of which may result in severe criminal penalties.

The petitioner, Mark Fisher, is typical of those who are aggrieved by the ambiguities within the Analogue Act resulting in the conflicting and confusing opinions regarding what substances are and are not included within the definition of a "controlled substance analogue". In the instant case the charges against Mr. Fisher are based on GBL being an analogue of GHB as a Schedule I controlled substance. Of course GHB was not a Schedule I controlled substance until March 13, 2000 when the first notice was published in the Federal Register. 65 Fed. Reg. 13235. The same Federal Register notice made the following reference to GBL:

> Public law 106-172 also places certain controls on GBL. These will be the subject of a separate Federal Register notice. 65 Fed. Reg. 13236.

One month later law enforcement agents "raided" Gold's Gym seizing bottles of "Verve" a chemical mixture containing GBL. While the District Court in the instant case

---

[3] The conflict of the Eleventh Circuit opinion with 21 U.S.C. § 802(32)(C)(i) was brought to the attention of the court through Petition for Rehearing, however, the petition was denied without comment. (App. E)

construed the statutory definitional clauses in the disjunctive, had petitioner resided and conducted his business in other parts of the country, the obvious structural dissimilarity of GBL to that of GHB would have precluded conviction of any charge based on GBL being a controlled substance analogue of GHB.

CONCLUSION

The court is urged to grant certiorari in this matter to resolve conflicts between circuit courts of appeal that have addressed the definition of a controlled substance analogue and to lend constitutionally required specificity to the analogue act and it's definitional components by construing those components conjunctively. Absent intervention by this Court through grant of certiorari, the analogue act will continue to be subject to conflicting interpretation leaving ordinary people unable to understand what substances are likely to fall within or without the definition of a "controlled substance analogue", the possession or distribution of which is deemed the same as that involving a Schedule I controlled substance.

Respectfully submitted,

JOSEPH L. HAMMONS
HAMMONS, LONGORIA & WHITTAKER, P.A.
17 West Cervantes Street
Pensacola, FL 32501
(850) 434-1068

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-11320

D.C. Docket No. 00-00068-CR-RV

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK FISHER,

Defendant-Appellant.

No. 01-11395

D. C. Docket No. 00-00068-CR-003

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DEVON SUTTON, a.k.a. Devon
Daniel Sutton,

Defendant-Appellant.

No. 01-13039

D. C. Docket No. 00-00068-CR-001

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTHUR ROBERTSON,

Defendant-Appellant.

Appeal from the United States District Court
Southern District of Alabama

(Filed May 2, 2002)

Before ANDERSON, Chief Judge, DUBINA, Circuit Judge, and MILLS*, District Judge.

MILLS, District Judge:

FACTS

On October 2, 2000, Appellants entered conditional pleas[1] to the charge of misprision of a felony:

* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

[1] The pleas were entered on the condition that Appellants be allowed to appeal the district court's denial of their joint Motion to Dismiss the Indictment.

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 4. The Government charged Appellants with knowledge of the commission of a felony involving the substance gamma-butyrolactone ("GBL").

Although GBL is not a controlled substance, the Government alleged that it was a controlled substance analogue of a Schedule I controlled substance – gamma-hydroxybutyrate acid ("GHB"). GHB is more commonly known as the "date-rape drug." According to the Drug Enforcement Administration ("DEA"), GHB can produce drowsiness, dizziness, nausea, visual disturbances, unconsciousness, seizures, severe respiratory depression and coma.[2] Addition of Gamma-Hydroxybutyric Acid to

---

[2] The DEA's Final Rule, published in the Federal Register, contained additional information about the dangerous effects associated with GHB.

> Overdose usually requires emergency medical treatment, including intensive care for respiratory depression and coma. Several Poison Control Centers have characterized and reported cases of GHB-dependence and withdrawal to the DEA. To date, DEA has documented over 5,700 overdoses and law enforcement encounters with GHB in 45 states. DEA has also documented 65 GHB-related deaths.

Addition of Gamma-Hydroxybutyric Acid to Schedule I, 65 Fed. Reg. 13235-13238 (March 13, 2000) (to be codified at 21 C.F.R. pts. 1301 and 1308).

Schedule I, 65 Fed. Reg. 13235-13238 (March 13, 2000) (to be codified at 21 C.F.R. pts. 1301 and 1308).

Appellant Mark Fisher owns and operates Gold's Gym in Mobile, Alabama and Pensacola, Florida. Gold's Gym provides facilities for exercising, bodybuilding, and weight training and sells a number of commercial products that are popular with patrons of physical fitness centers. One of the products sold was called "Verve."[3] Verve, a common industrial chemical, contained GBL which metabolized into GHB when ingested into the human body. GHB is believed by some to assist the release of growth hormones which in turn stimulate muscle growth. In addition, a human pharmaceutical formulation of GHB is being developed as a treatment for catalepsy, a condition associated with narcolepsy, a serious and debilitating disease.[4] Pub. Law No. 106-172, § 2(5) (2000).

Appellant Fisher filed a Motion to Dismiss the Indictment arguing that the application of Public Law 106-172 through the Analogue Act was unconstitutionally vague, arbitrary, capricious, and denied Appellant due process.[5] Specifically, Appellants argued that Public Law 106-172 and subsequently filed DEA rules did not put Appellants on notice that GBL was a controlled substance

---

[3] Appellant Devon Sutton purchased Verve from Gold's Gym and sold it to others, including a manager and bartender at a bar in Mobile, Alabama. Appellant Arthur Robertson sold Verve while he was employed as a manager at Gold's Gym.

[4] Cataplexy is defined as a sudden loss of muscle power following a strong emotional stimulus. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 179 (10th ed. 1996).

[5] All Appellants joined this motion at its hearing.

analogue. The district court denied Appellants' Motion holding:

> [T]he court is of the opinion that the GBL is a controlled substance analogue of GHB, a Schedule I controlled substance, and that the notice to defendants was constitutionally adequate, for the reasons set forth in the government's written and oral responses. In making this ruling, the court specifically notes that no party contests the constitutionality of Public Law 106-172 (the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000) and that no party denies that notice of the illegality of GHB was published in the Federal Register on March 13, 2000. Most importantly, it is undisputed that although GBL has no pharmacological effects on the human body in and of itself, it is quickly converted to GHB once it is ingested in the human body. Thus it readily appears that the only reason a person would ingest GBL would be to obtain the pharmacological effects that GHB produces on the human body. Arguments to the contrary belie the medical evidence and common sense.

United States v. Fisher, No. 00-00068 (D. Ala. Oct. 2, 2000) (order denying motion to dismiss indictment).

Appellants raise two issues. (1) Whether the Analogue Act 21 U.S.C. § 813, as applied to GBL, is unconstitutionally vague in that it provides inadequate notice of illegal behavior and allows arbitrary and discriminatory law enforcement? And (2) whether GBL is a controlled

substance analogue of GHB?[6] Courts that have addressed the constitutionality of the Analogue Act have evaluated it as it applies to a specific substance. Therefore, these issues are wrapped up together into the single issue of whether Appellants had constitutional notice that GBL was a controlled substance analogue of GHB?

---

[6] Appellant Sutton raises the additional issue that he did not have adequate constitutional notice because the March 13, 2000 DEA Rule appeared in the Federal Register only one day before his arrest. Looking at the docket sheet submitted with Appellant's appeal, it appears a bench warrant was issued for Appellant's arrest on April 18, 2000, more than a month after the Rule appeared in the Federal Register. Whether it was one day or thirty-six, it is well settled that when regulations are published in the Federal Register they give legal notice of their contents to all who may be affected thereby. *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 (1947); 44 U.S.C. § 1507.

> A document required by section 1505(a) of this title to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection as provided by section 1503 of this title. Unless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the documents to a person subject to or affected by it.

44 U.S.C. § 1507. In the past, parties have argued that it is unreasonable to expect ordinary people to obtain copies of the Federal Register. While this argument has some appeal, the U.S. Supreme Court has indicated that notices published in the Federal Register are adequate. *Lyng v. Payne,* 476 U.S. 926, 941 (1986). *Lyng* indicated that the Supreme Court believes the Federal Register is an appropriate vehicle for communicating action by federal agencies. *Hopp v. United States,* 661 F.Supp. 800, 801-802 (S.D. Ia. 1987).

The district court's decision that 21 U.S.C § 813 is not unconstitutionally vague is reviewed under a *de novo* standard. *United States v. Carlson,* 87 F.3d 440, 443 (11th Cir. 1996). The court's factual finding that GBL is a controlled substance analogue of GHB is reviewed for clear error. *United States v. Reid,* 69 F.3d 1109, 1113 (11th Cir. 1995).

ANALYSIS

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983). "Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender,* 461 U.S. at 357, quoting *Smith v. Goguen,* 415 U.S. 566, 574 (1974). Statutes without identifiable standards "allow [] policemen, prosecutors, and juries to pursue their personal predilections." *Smith,* 415 U.S. at 575. Except where First Amendment rights are involved, vagueness challenges must be evaluated in the light of the facts of the case at hand. *See United States v. Mazurie,* 419 U.S. 544, 550 (1975).

The Analogue Act[7]

The Fifth Circuit has addressed whether the Analogue Act is unconstitutionally vague. *See United States v. Granberry,* 916 F.2d 1008 (5th Cir. 1990). The court held:

> [D]espite Granberry's contention to the contrary, the term "controlled substance analogue" in § 813 is clearly and specifically defined, in terms readily comprehensible to the ordinary reader. It provides adequate notice of what conduct is prohibited. The statute makes plain that drugs which have been chemically designed to be similar to controlled substances, but which are not themselves listed on the controlled substance schedules, will nonetheless be considered as

---

[7] "A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purpose of any Federal Law as a controlled substance in schedule I." 21 U.S.C. § 813.

Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance –

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. § 802(32)(A) (2000).

> schedule I substances if (1) they are substantially similar chemically to drugs that are on those schedules; (2) if they produce similar effects on the central nervous system as drugs that are on those schedules; or (3) are intended or represented to produce effects similar to those produced by drugs that are on those schedules. There is nothing vague about the statute.

Granberry, 916 F.2d at 1010.

The Eleventh Circuit has cited *Granberry* with approval. *United States v. Carlson,* 87 F.3d 440, 443 (11th Cir. 1996). In *Carlson,* defendants argued that the definition of a controlled substance analogue was unconstitutionally vague as applied to 3,4-Methylenedioxymethamphetamine (MDMA). Specifically, defendants argued that the phrase "substantially similar" was not adequately defined and that they did not receive fair warning that their conduct was illegal. *Carlson,* 87 F.3d at 443. The court rejected defendants' argument and held that the Analogue Act was not unconstitutionally vague. *Id.* at 444.

A district court in Colorado reached a contrary result in a case involving alphaethyltryptamine ("AET"). In *United States v. Forbes,* 806 F.Supp. 232 (1992), defendants were charged with distribution of AET in violation of 21 U.S.C. §§ 813, 841, 846. The indictment alleged that AET was a controlled substance analogue because it had a substantially similar chemical structure to dimethyltryptamine ("DMT") and diethyltryptamine ("DET"), both schedule I controlled substances. *Forbes,* 806 F.Supp. at 233. The court dismissed the indictment because there was no scientific consensus that AET had a chemical structure that was substantially similar to DMT or DET. *Id.* at 239. Therefore, the district court held that the

Analogue Act, as applied to AET, was unconstitutionally vague. *Id.*

Appellants here argue that the Analogue Act was unconstitutionally vague as applied to GBL because Public Law 106-172 and subsequently issued DEA rules did not state any criteria by which a layperson could determine that GBL was a controlled substance analogue. They assert that the statute's lack of specificity failed to give them constitutional notice that GBL was an illegal substance and consequently, the public is subjected to arbitrary and/or discriminatory law enforcement.

Public Law 106-172 and DEA Rules

In Public Law 106-172, Congress found that the abuse of GHB was "an imminent hazard to the public safety." Pub. Law No. 106-172, § 3(a)(1) (2000). Accordingly, Congress ordered the Attorney General to issue a final order placing the drug in Schedule I. On March 13, 2000, the Drug Enforcement Administration, under authority delegated by the Attorney General, issued its Final Rule naming GHB a Schedule I Controlled Substance. Addition of Gamma-Hydroxybutyric Acid to Schedule I, 65 Fed.Reg. 13235-13238 (March 13, 2000) (to be codified at 21 C.F.R. pts. 1301 and 1308).[8]

---

[8] The DEA's Final Rule contained the following statement regarding GBL:

> The DEA has received reports that GBL, the solvent precursor for GHB, is being abused due to its rapid conversion to GHB soon after ingestion. On January 21, 1999, the FDA issued a request for a voluntary recall of all GBL-containing

(Continued on following page)

Although Congress did not designate GBL as a controlled substance, it recognized the dangerous proclivities of the chemical. In Section 2 of Public Law 106-172, Congress made the following finding: "If taken for human consumption, common industrial chemicals such as gamma butyrolactone [GBL] and 1.4-butanediol are swiftly converted by the body into GHB. Illicit use of these and other GHB analogues and precursor chemicals is a significant and growing law enforcement problem." Pub. Law No. 106-172, § 2(4) (2000).

In addition, Congress added GBL to the "List I Chemicals." Pub. Law No. 106-172, § 3(b)(2)(c) (2000); 21 U.S.C. § 802(34)(X). List I chemicals are chemicals that are used in manufacturing controlled substances. 21 U.S.C. § 802(34). Finally, Congress added a section to the definition of a controlled substance analogue. Pub. Law. No. 106-172, § 5(a); 21 U.S.C. § 802(32)(B). The new section states, "The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to paragraph (34) or (35) does not preclude a finding pursuant to subparagraph (A) of this paragraph that the chemical is a

---

products sold in health food stores and warned the public of its danger to the public health. FDA has also declared 1,4-butanediol, a chemical related to both GHB and GBL, a Class I Health Hazard. On May 11, 1999, the FDA issued another warning on 1,4 butanediol, GHB and GBL stating that these substances pose a significant health hazard. Public Law 106-172 also placed certain controls on GBL. These will be the subject of a separate Federal Register Notice.

Addition of Gamma-Hydroxybutyric Acid to Schedule I, 65 Fed.Reg. 13235-13238 (March 13, 2000) (to be codified at 21 C.F.R. pts. 1301 and 1308).

cal is a controlled substance analogue." 21 U.S.C. § 802(32)(B).

Appellants argue that because the DEA's March 13, 2000 Final Rule stated that the controls placed on GBL by Public Law 106-172 would be the subject of a separate Federal Register Notice, GBL had no legal status until the DEA filed that separate Federal Register Notice. Therefore, as of March 13, 2000, Appellants claim they had no notice that GBL was illegal.

On April 24, 2000, the DEA issued its anticipated Final Rule on GBL designating it a List I chemical in compliance with Public Law 106-172. In a paragraph entitled, "Is GBL Subject to Any Other Controls under the [Controlled Substances Act]?" the DEA made the following statement: "GBL and 1,4-butanediol are structurally and pharmacologically similar to GHB and are often substituted for GHB. Under certain circumstances they may satisfy the definition of a controlled substance analogue." Placement of Gamma-Butyrolactone in List I of the Controlled Substances Act, 65 Fed.Reg. 21645-21647 (April 24, 2000) (to be codified at 21 C.F.R. pt. 1310).

Appellants argue that even when the DEA issued the Final Rule on GBL, it simply clouded the issue because it said GBL would be a GHB analogue, "under certain circumstances," without further explanation. To further complicate things, Appellants argue, the definition of a controlled substance analogue, contained in 21 U.S.C. 802(32), is unconstitutionally vague. Appellants argue that the legal status of GBL is indefinite due to Public Law 106-172, the DEA's April 24, 2000 Final Rule, and the Analogue Act and that this ambiguity allows for arbitrary enforcement.

This Court finds that the public was given notice that all GHB analogues were illegal when Public Law 106-172 was enacted on February 18, 2000[9] and again when the DEA's Final Rule appeared in the Federal Register on March 13, 2000, at the direction of Congress, designating GHB a Schedule I controlled substance.[10] The next step in this constitutional analysis is to decide whether an ordinary person could look at the definition of controlled substance analogue and determine that GBL is an analogue of GHB.[11] Although statements found in Public Law

---

[9] Public Law 106-172, known as the "Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999," was signed into law on February 18, 2000. It did not become illegal to possess GHB until March 13, 2000 when the DEA issued its Final Rule designating GHB as a Schedule I controlled substance.

[10] Publication in the Federal Register constitutes notice to the public. *See* footnote 7.

[11] Appellants argue that Congress did not address whether GBL is illegal and that the DEA issued ambiguous rules on the subject. This is a red herring. Because a controlled substance analogue statute exists, the only step Congress had to take to make GHB analogues illegal was to schedule GHB a controlled substance. It did not have to specifically identify GHB analogues or place all GHB analogues on a list. The Analogue Act and its definition of controlled substance analogue is the source for identifying GHB analogues. If no Analogue Act existed, only those chemicals scheduled by Congress as controlled substances would be illegal and Appellants' argument would have force. Unfortunately for Appellants, the Analogue Act does exist. Therefore, under current law, all substances that meet the definition of a controlled substance analogue are illegal. No list of controlled substance analogues is necessary. Failure to specifically identify a substance as a controlled substance analogue is of no consequence. Contrary to Appellants' argument, statements on the issue made by Congress or the DEA do not cloud the issue at all. These statements actually gave Appellants additional notice that at least two separate bodies of government consider GBL to be an analogue. Statements by Congress or the DEA are not necessary to our analysis – they are only insightful.

106-172 and the DEA's Final Rules indicate that both Congress and the DEA considered GBL to be an analogue of GHB,[12] the only thing that matters is that GBL meets the controlled analogue definition. Therefore, the Court will use Section 802(32)(A) to determine if ordinary people would be able to determine that GBL is an illegal analogue of GHB. If so, then the Analogue Act is not unconstitutional as applied to GBL. *See Kolender,* 461 U.S. 352, 357

---

[12] The following statements were made by Congress and the DEA. "If taken for human consumption, common industrial chemicals such as gamma butyrolactone [GBL] and 1.4-butanediol are swiftly converted by the body into GHB. Illicit use of these and other GHB analogues and precursor chemicals is a significant and growing law enforcement problem." Pub. Law No. 106-172, § 2(4) (2000). "The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to paragraph (34) or (35) does not preclude a finding pursuant to subparagraph (A) of this paragraph that the chemical is a controlled substance analogue." Pub. Law. No. 106-172, § 5(a)

> The DEA has received reports that GBL, the solvent precursor for GHB, is being abused due to its rapid conversion to GHB soon after ingestion. On January 21, 1999, the FDA issued a request for a voluntary recall of all GBL-containing products sold in health food stores and warned the public of its danger to the public health. FDA has also declared 1,4-butanediol, a chemical related to both GHB and GBL, a Class I Health Hazard. On May 11, 1999, the FDA issued another warning on 1,4 butanediol, GHB and GBL stating that these substances pose a significant health hazard. Public Law 106-172 also placed certain controls on GBL. These will be the subject of a separate Federal Register Notice.

Addition of Gamma-Hydroxybutyric Acid to Schedule I, 65 Fed. Reg. 13235-13238 (March 13, 2000) (to be codified at 21 C.F.R. pts. 1301 and 1308). "GBL and 1,4-butanediol are structurally and pharmacologically similar to GHB and are often substituted for GHB. Under certain circumstances they may satisfy the definition of a controlled substance analogue." Placement of Gamma-Butyrolactone in List I of the Controlled Substances Act, 65 Fed. Reg. 21645-21647 (April 24, 2000) (to be codified at 21 C.F.R. pt. 1310).

(1983) (holding that a statute is not void for vagueness if ordinary people can understand what conduct is prohibited).

The Definition

The district court here found that GBL was a controlled substance analogue of GHB. This factual finding is reviewed for clear error. *United States v. Reid,* 69 F.3d 1109, 1113 (11th Cir. 1995).

Appellants argue that GBL does not meet the controlled substance analogue definition. 21 U.S.C. § 802(32)(A).[13] Specifically, Appellants allege that the chemical structure of GBL is not substantially similar to the chemical structure of GHB and that GBL does not

---

[13] Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance –

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. § 802(32)(A).

have an effect on the central nervous system substantially similar to that of GHB.

The definition of a controlled substance analogue contains three subparagraphs. The first issue in applying the definition is to determine whether these subparagraphs are to be read in the conjunctive or the disjunctive. Appellants argue the definition should be read as requiring subparagraph (i) *and* either subparagraph (ii) or (iii). The Government argues that the definition should be read disjunctively, effectively creating three separate definitions.

The first rule in statutory construction is to determine whether the "language at issue has a plain and unambiguous meaning with regard to the particular dispute." *Smith v. Magras,* 124 F.3d 457, 462 (3d. Cir. 1997). If the statute's meaning is plain and unambiguous, there is no need for further inquiry. The plain language is presumed to express congressional intent and will control a court's interpretation.

> As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used. Thus absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982).

A plain reading of the statute would indicate that the definition should be read in the alternative. It reads (i); (ii); or (iii). However, appellate courts have concluded

differently. *McKinney v. United States,* 79 F.3d 105, 107-108 (8th Cir. 1996) assumes without holding that the definition is a two-prong test, with a conjunction between clause (i) and (ii). The Fifth Circuit in *Granberry* paraphrased the definition in the disjunctive.

The district courts that have addressed the issue also came to different conclusions. Appellants rely on *United States v. Forbes,* 806 F.Supp. 232, 234-236 (D.C. Colo. 1992), which held the definition must be in the conjunctive to avoid absurd results. In *United States v. Greig,* 144 F.Supp.2d 386 (D. Vi. 2001), the Court held the definition was in the disjunctive. The Southern District of New York recently issued an opinion holding the definition was in the conjunctive. *United States v. Roberts,* No. 01 CR 410 RWS, unpublished opinion (S.D.N.Y. Dec. 14, 2001).

We find there is no reason to take sides on this issue as GBL satisfies both subparagraphs (i) and (ii). 21 U.S.C. § 802(32)(i)-(ii).

Defendant Fisher's expert, Rodney Guttmann, Ph.D., submitted an affidavit in which he testified that the chemical structures of GBL and GHB are not substantially similar. In addition, Dr. Guttmann testified that recent data indicates GBL has little, if any, effect on the brain. Dr. Guttmann also testified that "the stimulant, depressant, or hallucinogenic effect on the central nervous system by GBL and GHB are not substantially similar." However, Dr. Guttman continues by saying:

> [b]ecause GHB is a metabolite of GBL, care must be taken when evaluating data taken from certain studies as the effects of GBL may be attributable to GHB rather than GBL itself. For example, it is sometimes stated that GBL has

> greater effects than GHB. This statement is only partially correct as the effects described are not actually due to GBL but the metabolically active product, GHB. (Supplemental Affidavit of Dr. Guttmann.)

While academics may distinguish between how the originally ingested substance affects the body as compared to how the substance's metabolite affects the body, the Court will not make such a distinction. Once GBL is ingested, the body transforms it into a GBL metabolite: GHB. This transformation is not without consequence; along with it comes all the harmful effects associated with GHB. For this reason, it is ludicrous to argue that GBL has no effect on the central nervous system. After ingestion, a person, by will or by choice, cannot prevent GBL from metabolizing into GHB. The district court's assessment of the facts was not clearly erroneous.

It is undisputed that GBL has no pharmacological effects in a vacuum. However, the human body is not a vacuum. It is also undisputed that upon ingestion, GBL converts into a GBL metabolite: GHB. Therefore, this Court finds that GBL upon ingestion meets the definition of a controlled substance analogue as its chemical structure and effect on the central nervous system are substantially similar to GHB, a Schedule I Controlled Substance. 21 U.S.C. § 802(32)(A)(i)-(ii). People of ordinary intelligence would easily be able to determine that a substance, which is converted upon ingestion into a metabolite with a substantially similar chemical structure and effect on the central nervous system as a schedule I controlled substance, would meet the definition of a controlled substance analogue.

We affirm the district court's holding and find that the Analogue Act 21 U.S.C. § 813, as applied to GBL, is not unconstitutionally vague. Appellants had constitutional notice that GBL was a controlled substance analogue of GHB.

AFFIRMED.

APPENDIX B

United States Court of Appeals
For the Eleventh Circuit

No. 01-11320

District Court Docket No.
00-00068-CR-RV

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK FISHER,

Defendant-Appellant.

No. 01-11395

District Court Docket No.
00-00068-CR-03

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DEVON SUTTON,
a.k.a. Devon Daniel Sutton,

Defendant-Appellant.

No. 01-13039

District Court Docket No.
00-00068-CR-01

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTHUR ROBERTSON,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Alabama

JUDGMENT

(Filed May 2, 2002)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: May 2, 2002
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

A True Copy – Attested:
Clerk, U.S. Court of Appeals
Eleventh Circuit
By: /s/ [Illegible]
Deputy Clerk
Atlanta, Georgia

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. **Criminal No.: 00-00068-RV**

MARK FISHER, **USAO No.: 00R00142**
ARTHUR ROBERTSON,
CHAD ORSO, and
DEVON SUTTON,

Defendants.

MOTION TO DISMISS INDICTMENT

Defendant Mark Fisher, through counsel, moves the Court to dismiss the indictment and in support thereof states the following:

1. The Superseding Indictment in this case charges Mark Fisher and others with conspiracy and substantive possession and distribution of a controlled substance analogue in violation of Title 21, United States Code, §841(a)(1) and 21 C.F.R. §1308.11(e)(1). Defendant Fisher is charged in Count I with conspiracy to possess and distribute GBL, "a controlled substance analogue of gamma-hydroxybutyric acid (GHB), a Schedule I controlled substance" and in Count III with possession and distribution of the same.

2. The indictment is based upon the provisions of Public Law 106-172, an amendment to the Controlled Substances Act, directing the scheduling of gamma-hydroxybutyric acid (GHB) as a Schedule I controlled

substance notwithstanding the statutory requirements for placement on Schedule I and in derogation of the rules, regulations, and hearings requisite to placement of any drug or substance on Schedule I. 21 U.S.C. §812 and 21 U.S.C. §811.

3. While Public Law 106-172 is described as an act "to direct the emergency scheduling of gamma-hydroxybutyric acid", the Act also directs the listing of gamma-hydroxybutyric (GBL) as a "List I chemical" and provides that the designation of gamma-butyrolactone or any other chemical as a "listed chemical" does not preclude a finding that the "listed chemical" is a controlled substance analogue as defined at 21 U.S.C. §802(32)(A).

4. GBL is a chemical precursor to GHB. FDA-authorized medical studies in progress to examine the potential uses of GHB in the treatment of cataplexy associated with narcolepsy. GHB, if abused, may produce euphoric and hallucinogenic states. GHB is also alleged to have a role as a growth hormone to stimulate muscle growth. PL 106-172.

5. On February 18, 2000, President Clinton signed Public Law 106-172.

6. On March 13, 2000, the Federal Register published the "final rule" placing GHB into Schedule I of the Controlled Substances Act and provided for criminal penalties under the Controlled Substances Act effective March 13, 2000. The Federal Register notice stated the following with respect to GBL:

> Public Law 106-172 also placed certain controls on GBL. These will be the subject of a separate Federal Register notice. 65 Fed. Reg. 13235-13238.

7. On April 19, 2000, a federal search warrant was executed at Gold's Gym in Mobile, Alabama. During the search, seventeen (17) bottles of liquid Verve, which are alleged to contain a mixture including GBL, were seized. On April 21, 2000, the balance of the approximately 230 quarts of Verve, a mixture containing GBL as alleged in the indictment, was seized from a storage facility.

8. On April 24, 2000 (three days after the last date of any criminal activity alleged in the Indictment), the Federal Register published the "separate Federal Register notice" referenced in paragraph 4 above regarding "controls" on GBL. 65 Fed. Reg. 21645-21647. Among other things, the April 24, 2000 Federal Register notice advised that GBL functions as a "chemical precursor for the manufacture of GHB" and that "under certain circumstances" GBL may be an analogue to GHB and may satisfy the definition of a controlled substance analogue as defined at 21 U.S.C. §802(32) and 21 U.S.C. §813 (Analogue Act). The notice also advised that chemical mixtures that contain GBL will be the subject of a later notice.

9. In consideration of the foregoing, the application of Public Law 106-172 is unconstitutionally vague and denies Defendant Mark Fisher due process of law in that it fails to give fair warning and/or reasonable opportunity to know of prohibited conduct and allows for arbitrary enforcement with respect to Defendant Mark Fisher and others under the circumstances and for the period covered by the Indictment (March 14, 2000 through April 21, 2000).

10. In consideration of the foregoing, the application of Public Law 106-172 through 21 U.S.C. §813 (Analogue Act) is unconstitutionally vague, arbitrary, capricious, and

denies due process of law in that the Analogue Act was intended to punish possession of analogues to a "Schedule I controlled substance" that was scheduled pursuant to the statutory requisites of Title 21, §§811 and 812. Those statutory provisions were overridden by Public Law 106-172 directing the Attorney General to place GHB as a Schedule I controlled substance notwithstanding statutory and administrative provisions which otherwise provided notice, opportunity for hearing and classification of substances based upon ascertainable rational standards.

11. In consideration of the foregoing, the application of Public Law 106-172 and the Analogue Act is unconstitutionally vague and allows for arbitrary enforcement on the determinative question of whether GBL "under certain conditions" is an analogue of GHB within the meaning of 21 U.S.C. §802(32)(A) and 21 U.S.C. §813. GBL does not meet the definition of a controlled substance analogue under 21 U.S.C. §802(32)(A) in that its chemical structure is not similar to that of GHB nor does GBL produce a similar pharmacological effect on those consuming the substance unless and until GBL is converted from GBL to GHB.

WHEREFORE, in consideration of the above, Defendant Mark Fisher moves for dismissal of the indictment.

* * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and accurate copy of the foregoing Motion to Dismiss Indictment has been furnished, by U.S. Mail, to the U.S. Attorney's Office, 63 S.

Royal St., Suite 600, Mobile, AL 36602, this 5th of July, 2000.

/s/ Joseph Hammons
JOSEPH L. HAMMONS
Florida Bar No. 218979
Hammons & Whittaker, P.A.
17 West Cervantes Street
Pensacola, FL 32501
Attorney for Defendant,
Mark Fisher
(850) 434-1068
Fax: (850) 434-3597

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA

v.

MARK FISHER	**CRIMINAL ACTION**
ARTHUR ROBERTSON	**NO. 1:00-00068**
CHAD ORSO DEVON SUTTON	**(1, 2, 3 & 4)-RV**

ORDER

(Filed October 2, 2000)

This matter is before the court on the following documents:

1. "Motion to Dismiss the Indictment," (doc. 65), together with a supporting memorandum, (doc. 66), and evidentiary material, (docs. 67 & 99[1]), filed by **defendant Mark Fisher**;[2] and

2. Response, (doc. 83), together with evidentiary material, (doc. 85), filed by the government.[3]

---

[1] **Defendant Fisher's "Motion for Leave of Court to File Supplemental Affidavit of Rodney Guttman, Ph.D.," (doc. 99), is GRANTED. The Clerk is DIRECTED to file the affidavit attached thereto.**

[2] Notwithstanding defendant **Arthur Robertson's** belated adoption of defendant Fisher's motion dismiss, (doc. 105), the court will apply its ruling on the motion as to all defendants, given the nature of the issues covered by the ruling.

[3] **The government's "Request for Permission to File Supplemental Brief," (doc. 96), is DENIED, and defendant Fisher's "Response to Government's Request for Permission to File Supplemental Brief," (doc. 98), is MOOT.**

On July 27, 2000, the court conducted oral argument on the motion to dismiss. After hearing from counsel and reviewing the applicable law, the court is of the opinion that the GBL is a controlled substance analogue[4] of GHB, as Schedule I controlled substance, and that the notice to defendants was constitutionally adequate, for the reasons set forth in the government's written and oral responses. In making this ruling, the court specifically notes that no party contests the constitutionality of Public Law 106-172 (the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000)[5] and that no party denies that notice of the illegality of GHB was published in the Federal Register on March 13, 2000. Most importantly, it is undisputed that although GBL has no pharmacological effects on the human body in and of itself, it is quickly converted to GHB once it is ingested in the human body. Thus, it readily appears that the only reason a person would ingest GBL would be to obtain the pharmacological effects that GHB produces on the human body. Arguments to the contrary belie the medical evidence and common sense. According, **it is**

ORDERED that the motion to dismiss is DENIED.[6]

---

[4] 21 U.S.C. § 813 ("A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law[,] as a controlled substance in Schedule I.").

[5] To the extent that **defendant Fisher** advances such arguments in his written motion and memorandum, he orally withdrew those arguments during the July 27th hearing.

[6] **It is ORDERED that defendant Fisher's "Motion to Suppress," (doc. 79) and "Motion in Limine," (doc. 80), are DENIED to the extent those motions are predicated upon the same arguments presented in the motion to dismiss.**

DONE this 2nd day of October, 2000.

/s/ Richard W. Vollmer, Jr.
RICHARD W. VOLLMER, JR.
UNITED STATES
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 8th day of May, 2001, by U.S. Mail, to Patsy Dow, Esquire, Ass't. United States Attorney, United States Attorney's Office, 63 South Royal St., Suite 600, Mobile, AL 36602; Kristen Gartman Rogers, Esq., Federal Public Defender, 2 South Water St., 2nd Floor, Mobile, AL 36602; Joe Carl Jordan, Esq., Ross & Jordan, LLC, P.O. Box 210, Mobile, AL 36601, and W.A. Kimbrough, esq., 1359 Dauphin St., Mobile, AL 36604, and further, that the originals were transmitted to the Clerk, United States Court of Appeals for the Eleventh Circuit, on the same date by Airborne, a third-party commercial carrier, for next day delivery.

/s/ Joseph L. Hammons
JOSEPH L. HAMMONS
Florida Bar No. 218979
Hammons, Longoria &
Whittaker, P.A.
17 West Cervantes Street
Pensacola, FL 32501
(850) 434-1068
Attorney for Appellant
Mark Fisher

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-11320-CC, 01-11395-CC & 01-13039-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK FISHER,
DEVON SUTTON, a.k.a Devon
Daniel Sutton, and
ARTHUR ROBERTSON,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Alabama

---

(Filed Aug. 28, 2002)

BEFORE: ANDERSON and DUBINA, Circuit Judges, and MILLS*, District Judge.

PER CURIAM:

---

* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

The petition(s) for rehearing filed by Appellants, Fisher and Sutton, is DENIED.

ENTERED FOR THE COURT:
/s/ [Illegible]
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-11320-CC, 01-11395-CC & 01-13039-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK FISHER,
DEVON SUTTON, a.k.a Devon
Daniel Sutton, and
ARTHUR ROBERTSON,

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Alabama

BEFORE: ANDERSON, DUBINA, Circuit Judges, and MILLS*, District Judge.

---

* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Arthur Robertson, is DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
UNITED STATES CIRCUIT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

USA,

Appellee,

11th CIRCUIT
CASE NO.: 01-11320-C

v.

MARK FISHER,

Appellant.

PETITION FOR PANEL REHEARING

ON APPEAL FROM THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF ALABAMA

Joseph L. Hammons
Florida Bar No. 218979
HAMMONS, LONGORIA
& WHITTAKER, P.A.
17 W. Cervantes Street
Pensacola, Florida 32501
(850) 434-1068
Attorney for Appellant Mark Fisher

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PETITION FOR PANEL REHEARING 1

I. THE PANEL OPINION MISAPPREHENDS THE LAW IN APPLYING THE STATUTORY DEFINITION OF AN ANALOGUE TO GBL ONLY AFTER THE CHEMICAL STRUCTURE HAS BEEN ALTERED FROM THAT WHICH CONSTITUTES GBL TO THAT WHICH CONSTITUTES GHB 1

A. The panel opinion conflicts with the definition of an analogue under 21 U.S.C. § 802(32)(A) 2

B. The panel opinion conflicts with the provisions of 21 U.S.C. § 802(32)(C) 4

C. The panel opinion applied the wrong standard of review in determining whether GBL is a controlled substance analogue of GHB 5

CERTIFICATE OF SERVICE 7

TABLE OF CITATIONS

CASES:

	Page
United States v. Carlson, 87 F.3d 440 (11th Cir. 1996)	4-5
United States v. Clifford, ___ F.3d ___, 2002 WL 741654, 741656 (E.D. Va. 2002)	2
United States v. Reid, 69 F.3d 1009, 1113 (11th Cir. 1995)	6
U.S. v. Rojas, 47 F.3d 1078, 1080 (11th Cir. 1995)	6
U.S. v. Trout, 68 F.3d 1276, 1279 (11th Cir. 1995)	6

STATUTES:

21 U.S.C. § 802(32)	1, 5, 6
21 U.S.C. § 802(32)(A)	1, 2, 5
21 U.S.C. § 802(32)(A)(i)-(ii)	1
21 U.S.C. § 802(32)(C)	4
21 U.S.C. § 802(32)(C)(i)	4, 5

PETITION FOR PANEL REHEARING

I. THE PANEL OPINION MISAPPREHENDS THE LAW IN APPLYING THE STATUTORY DEFINITION OF AN ANALOGUE TO GBL ONLY AFTER THE CHEMICAL STRUCTURE HAS BEEN ALTERED FR THAT WHICH CONSTITUTES GBL TO THAT WHICH CONSTITUTES GHB.

The foundation of the original indictment and superseding indictment rests upon the premise that GBL is an analogue of GHB, a Schedule I controlled substance. The

dispositive issue before the court was whether GBL, a listed chemical, is an analogue of GHB, a Schedule I Controlled Substance, within the meaning of 21 U.S.C. § 802(32). In pertinent part, the panel opinion stated:

> It is undisputed that GBL has no pharmacological effects in a vacuum. However, the human body is not a vacuum. It is also undisputed that upon ingestion, GBL converts into a GBL metabolite: GHB. Therefore, this Court finds that GBL upon ingestion meets the definition of a controlled substance analogue as its chemical structure and effect on the central nervous system are substantially similar to GHB, a Schedule I Controlled Substance. 21 U.S.C. § 802(32)(A)(i)-(ii). People of ordinary intelligence would easily be able to determine that a substance, which is converted upon ingestion into a metabolite with a substantially similar chemical structure and effect on the central nervous system as a schedule I controlled substance, would meet the definition of a controlled substance analogue. (Opinion, p.18).

According to the panel opinion, GBL is an analogue of GHB because, after ingestion, GBL is metabolized by the human body so that it converts into GHB. To reach this conclusion, the panel opinion applies the definitional test under § 802(32)(A) to the substance at issue only after the human body has metabolized GBL into panel opinion's approach of applying the statutory definition of an analogue to GBL only after it is converted by the human body into GHB was not argued or briefed by either party. To apply the statutory definition of an analogue to GBL only after it has been altered from its original state by human body metabolism into a different chemical substance is a

misapplication of the law for reasons which will be addressed below.

A. The panel opinion conflicts with the definition of an analogue under 21 U.S.C. § 802(32)(A).

The statutory definition of the term "controlled substance analogue" requires the substance at issue to have a chemical structure "substantially similar to the chemical structure of a controlled substance in schedule I or II" and that the substance have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to that of a controlled substance in Schedule I or II.[1] § 802(32)(A). The undisputed evidence of record demonstrates the chemical structures of GBL and GHB are represented by the following diagrams:

[1] The issue of whether the definitional elements of a controlled substance analogue under § 802(32)(A) are to be applied disjunctively or conjunctively was briefed and argued by the parties. As recently as April 23, 2002, another district court reviewing the legislative history underlying the Analogue Act has concluded "it is clear that Congress intended § 802(32)(A) to be read conjunctively." United States v. Clifford, ___ F.3d ___, 2002 WL 741654, 741656 (E.D. Va. 2002). While the panel opinion indicated it was inclined to follow the only district court opinion applying the statute disjunctively, the panel opinion did not rule directly on this issue contending that, after GBL is ingested and metabolized into GHB, the two definitional elements, that of substantially similar chemical structure and substantially similar pharmacological effect, were both satisfied.

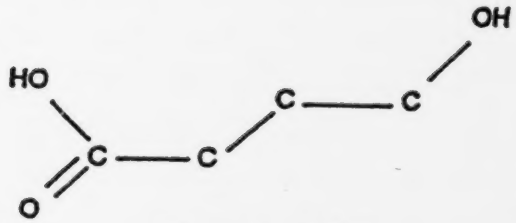

Figure 1. GHB

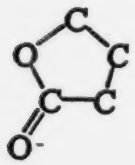

Figure 2. GBL

(Diagrams are of record through the government's Response to Defendant Fisher's Motion to Dismiss Indictment). (R1-83-9).

The test for determining substantial similarity of chemical structure is whether a reasonable layperson would so conclude. The panel opinion avoids the obvious conclusion that these two chemical structures are not substantially similar by applying the definitional test only after GBL, the substance at issue, was metabolized by the human body into a different chemical substance, GHB. After this chemical conversion, the panel opinion assumes the chemical structure must be substantially similar to that of GHB. More accurately stated, because of the chemical conversion, the chemical structure would not be substantially similar, it would be the *same* because it is, in fact, GHB. It is an error of law to apply the statutory definitional component requiring substantially similar chemical structure to the substance at issue after that substance has been converted and changed into a different chemical substance. It is also an error of law to apply the statutory definitional component requiring substantially similar chemical structure by concluding a chemical is "substantially similar" when it is, in fact, *identical* because it has been converted to GHB.

B. The panel opinion conflicts with the provisions of 21 U.S.C. § 802(32)(C).

The evidence of record is undisputed that, after ingestion; the human body through chemical process metabolizes GBL into the Schedule I Controlled Substance, GHB. In recognition of that scientific fact, the panel opinion then applied the definitional components of a controlled substance analogue to GBL only after it is metabolized into GHB. This opinion and analysis by the Court, however, violates the provisions of 21 U.S.C. § 802(32)(C). Subparagraph (C)(i) specifically excludes from the definition of a controlled substance analogue any "controlled substance". 21 U.S.C. § 802(32)(C)(i). See also *United States v. Carlson*, 87 F.3d 440 (11th Cir. 1996) (where final administrative rule listing MDMA as a Schedule I controlled substance was invalidated, MDMA then became a controlled substance analogue).

The panel opinion, in defining the issue, stated "the only thing that matters is that GBL meets the controlled substance analogue definition" and whether "ordinary people" would be able to determine GBL is an analogue of GHB by applying the statutory definition of a controlled substance analogue under § 802(32). (Opinion, p. 14).

It is speculative at best to assume that "ordinary people" would conclude (1) that the § 802(32)(A) definitional components are to be applied for analysis purposes only after the substance: at issue has been chemically altered to become a different substance, and (2) that even though the altered substance has become a controlled substance, in this case GHB, that § 802(32)(C)(i) excluding controlled substances from the definition of a controlled substance analogue does not apply.

C. The panel opinion applied the wrong standard of review in determining whether GBL is a controlled substance analogue of GHB.

The panel opinion concludes the district court's finding that GBL is a controlled substance analogue of GHB is to be reviewed for clear error describing the finding as "factual". It is not the district court's factual findings that are in dispute. It is the application of the statutory definition of a controlled substance analogue to those findings that is at issue on appeal. While the panel opinion cites *United States v. Reid*, 69 10d 1009, 1113 (11th Cir. 1995), as the authority for the clear error standard of review, a proper application of *Reid* demonstrates that while the district court's factual findings are reviewed for clear error, application of law to those facts is *de novo*. See also *U.S. v. Rojas*, 47 F.3d 1078, 1080 (11th Cir. 1995); *U.S. v. Trout*, 68 F.3d 1276, 1279 (11th Cir. 1995).

Although Appellant, Mark Fisher, when before the district court had requested an evidentiary hearing to present scientific evidence regarding the definitional components of a controlled substance analogue under § 802(32), the request was denied. However, the factual information of record regarding the chemical structure and pharmacological effects of GBL and GHB is not in dispute. It is the application of law to those facts that is presented for review on appeal. Specifically, given the facts as determined by the district court, whether GBL is a controlled substance analogue as defined by § 802(32). The standard of review is *de novo*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 21st day of May, 2002, by U.S. Mail, to Charles A. Kandt, Esquire, Ass't. United States Attorney, United States Attorney's Office, 63 South Royal St., Suite 600, Mobile, AL 36602; Kristen Gartman Rogers, Esq., Federal Public Defender, 2 South Water St., 2nd Floor, Mobile, AL 36602; Joe Carl Jordan, Esq., Ross & Jordan, LLC, P.O. Box 210, Mobile, AL 36601, and W. A. Kimbrough, Esq., 1359 Dauphin St., Mobile, AL 36604, and further, that the original was transmitted to the Clerk, United States Court of Appeals for the Eleventh Circuit, on the same date by Airborne Express, a third-party commercial carrier, for next day delivery

/s/ Joseph L. Hammons
JOSEPH L. HAMMONS
Florida Bar No. 218979
Hammons, Longoria & Whittaker, P.A.
17 West Cervantes Street
Pensacola, FL 32501
(850) 434-1068
Attorney for Appellant Mark Fisher